No. 134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

UNITED STATES, *Petitioner*

v.

LOUIS TOWNSLEY.

BRIEF OPPOSING THE GRANTING OF PETITION.

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OPINION BELOW.

The opinion of the Court of Claims (R. 14-29) has not yet been officially reported.

JURISDICTION.

The judgment of the Court of Claims was entered on March 6, 1944 (R. 29). The petition for Writ of Certiorari was filed on June 6, 1944. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED.

(1) Whether Section 23 of the Act of March 28, 1934, providing for overtime compensation for services performed in excess of 40 hours per week, applies to Government employees whose compensation is fixed by "Wage

boards or other wage-fixing authorities" on a monthly basis.

(2) If the foregoing question is answered in the affirmative, whether the Court of Claims employed the proper method of determining the daily rate upon which overtime compensation is to be calculated.

STATUTES INVOLVED.

The pertinent portion of the statute involved is set forth in the Petition for Writ of Certiorari, (pages 2, 3), to which reference is hereby made.

STATEMENT.

The statement of facts contained in the Petition for Writ of Certiorari, (pages 4-6), fairly sets forth the facts in the case.

SUMMARY OF REASONS FOR DENYING THE WRIT.

The Writ of Certiorari should be denied because:

1. The decision by the Court of Claims is correct and sound.

2. The case does not involve questions of sufficient public importance to justify its consideration by this Court.

ARGUMENT.

1. It is respondent's position that Section 23 of the Act of March 28, 1934, c. 102, 48 Stat. 522 (5 U. S. C. 673c), limits the regular hours of labor of those Government employees whose wages or compensation is fixed by wage boards or other wage fixing authorities to forty hours per week, and provides overtime compensation for all work in excess of forty hours per week performed by such employees.

The language of Section 23 is clear and unambiguous, and the Court below, in upholding respondent's claim, gave

the language of the Section its obvious meaning in accord with the intent of the Congress as expressed by the words employed in the Statute. Therefore, under the well established rules of statutory construction, there is no reason to seek outside aid to determine the meaning and effect of Section 23. *Boudinot (Cherokee Tobacco)* v. *United States*, 11 Wall. 616, 620; *United States* v. *Lexington Mill Co.*, 232 U. S. 399, 409-410; *Caminetti* v. *United States*, 242 U. S. 470 485.

Petitioner does not contend that the language of Section 23 is not clear or ambiguous, nor does it dispute directly the statement of the Court below that the Act, on its face, is just as applicable to monthly employees as to any other employees. It does, however, ask this Court to refuse to give full effect to the Section because it contends, (a) the use of the words "weekly compensation" in the Section indicates that the Congress did not intend for the Section to apply to employees whose wages or compensation was fixed on a monthly basis, (b) the legislative history of the Section indicates that the Congress did not intend it to apply to monthly or annual employees, (c) the administrative practice is in accord with the construction for which it contends, and (d) the administrative practice was open and well known, and hence presumably was known to the Congress. Each of petitioner's contentions will be discussed separately.

a. Use of the words, "weekly compensation".

It is asserted by petitioner that the use of the words, "weekly compensation" in Section 23 indicates that the Congress did not intend the Section to apply to any employees other than those whose wages or compensation was fixed on an hourly or a daily basis. The weekly compensation of hourly and per diem employees, it is stated, is readily ascertainable, while the compensation of monthly and annual employees is not calculated on a weekly basis, and there is no statutory authority to do so.

The use of the words, "weekly compensation" is not significant. The purpose of Section 23 is to limit the hours of work and at the same time reestablish and maintain the same total compensation paid to employees in 1932. To accomplish this result both hours of labor and total compensation had to be expressed in some period of time. The period used was the week; it could as well have been the month. Had this latter period been used it could not seriously be contended that hourly and per diem employees were thereby excluded from the benefits of the Act.

Actually there are no "weekly" employees of the Government. To ascertain the weekly compensation of a per diem or an hourly employee a simple problem in multiplication is involved. To ascertain the weekly compensation of a monthly or annual employee a simple problem in division is involved. The use of the words, "weekly compensation" if indicative of anything, would seem to be that the Congress intended the Section to apply to all employees regardless of the basis upon which they received their compensation, for some mathematical computation is necessary in order to ascertain the weekly compensation of hourly, per diem and monthly employees.

The contention that there is no statutory authority for determining the weekly compensation of an employee paid by the month seems to conflict with petitioner's later argument to the effect that Section 6 of the Act of June 30, 1906, c. 3914, 34 Stat. 697 (5 U. S. C. 84), provides a method for determining the daily pay of such employees (p. 19 of petition for Certiorari).

Petitioner also urges that the discrimination between hourly and per diem employees on the one hand, and monthly or annual employees on the other, which it asserts the Congress intended to make in Section 23, is a reasonable one, for hourly and per diem workers do customarily receive overtime compensation while monthly and annual employees do not.

This contention is likewise refuted by its later argument that Section 6 of the Act of June 30, 1906, *supra*, provides

a method for computing the amount of overtime compensation for monthly and annual employees. If the Congress has, as petitioner contends, enacted a statute providing a method for computing the overtime compensation of monthly and annual employees, the practice of paying overtime to such employees can scarcely be said to be so unusual as to justify this Court saying that the Congress intended a discrimination on that account. In any event the question for the Court is not whether there is any good reason for making a discrimination between one class and others to which an act unquestionably applies, but whether, in fact, such discrimination was made. *Levy Court of Washington* v. *Ringgold*, 5 Pet. 451, 455.

Attention is also directed to the fact that the Congress, as early as 1888 provided overtime compensation to certain employees paid on an annual basis. The Act of May 24, 1888, c. 308, 25 Stat. 157, provided overtime compensation for letter carriers, paid on an annual basis. This Court upheld the claims of the letter carriers for the overtime compensation as provided by that Act. *Post* v. *United States*, 148 U. S. 124, affirming 27 C. Cls. 244.

From the foregoing it is obvious that there is nothing in the language of Section 23 which in any way indicates that the Congress intended to make the discrimination between hourly and per diem employees, on the one hand, and monthly or annual employees on the other, which petitioner contends should be made.

b. Legislative history of Section 23.

Petitioner next contends that the legislative history of Section 23 indicates that the Congress did not intend it to apply to monthly or to annual employees.

The only portion of the alleged legislative history relied upon by petitioner in support of this contention is that comprising a statement made by one N. P. Alifas, who appeared before a Senate Subcommittee of the Senate Committee which was considering the Bill which became the 1934 Act (H. R. 6663, 73rd Cong. 2d Sess., pp. 59, 61). Mr. Ali-

fas' statement appears in Appendix A to the petition for Certiorari.

Mr. Alifas purported to speak for some of the hourly and per diem employees of the Government. He proposed an amendment to the Bill which was intended to alleviate certain alleged injustices to such employees. His proposed amendment while similar in some respects to Section 23 as finally enacted, did not contain the *proviso* limiting the work week to forty hours and providing for overtime compensation. Moreover, it was not adopted by the Senate Committee.

Section 23 as finally enacted was offered as an amendment to the 1934 Bill by Senator Thomas (Cong. Rec., Vol. 78, Part 3, p. 2977, 73rd Cong., 2d Sess.). It was adopted and ultimately enacted by the Congress in the precise form in which he offered it. So far as appears the *proviso* to Section 23, originated with him, and there is absolutely nothing in any of the legislative history which indicates that he did not intend the *proviso* to apply to all employees whose wages or compensation was fixed by wage-boards or other wage fixing authorities.

c. The alleged well established administrative practice.

Petitioner, in this connection first asserts that the Act of March 3, 1883, c. 128, 22 Stat. 531, 563, as continued by Section 7 of the Act of March 15, 1898, c. 68, 30 Stat. 277, 316, (5 U. S. C. 29) prohibits the payment of overtime compensation to employees of the executive departments of the Government, for services in excess of the hours fixed by Statute.

Again this contention is in conflict with its later argument that Section 6 of the Act of June 30, 1906, *supra* provides a method for computing the overtime compensation of monthly and annual employees of the Government.

Or, if petitioner's contention be sound it would seem that the 1883 and 1898 Acts, would prohibit the payment of overtime compensation to those hourly and per diem employees to whom Section 23 admittedly does and has been applied.

The complete answer to this part of petitioner's argument is that Section 23 of the 1934 Act, specifically providing for overtime compensation to a certain class of Government employees, repeals, supersedes, or renders nugatory any earlier general legislation prohibiting the payment of overtime compensation to employees of the executive departments. *cf. United States* v. *California*, 297 U. S. 175, 188. Manifestly Congress can and does change existing laws from time to time to fit changing conditions.

Turning to the alleged administrative practice since 1934:

There is no showing made that the Governor of the Panama Canal ever determined whether Section 23 was or was not applicable to monthly employees. Such determinations as were made were made by the Comptroller General.* This Court has held that it will not look to such rulings for aid in the judicial interpretation of a statute. *Alaska S. S. Co.* v. *United States*, 290 U. S. 256, 264.

However, even if the opinions of the Comptroller General do constitute proper administrative practice, they do not support petitioner's contention. The Comptroller General has consistently held that Section 23 does not apply to monthly employees, and that such employees may not regularly be employed in excess of forty hours per week. 14 Comp. Gen. 156-165.

It is true that the Comptroller General has held that monthly and per annum employees, to whom Section 23 applies, are not entitled to overtime compensation, but he has consistently held that such employees must be placed on a forty hour week. Thus, in a decision addressed to the Public Printer, 13 Comp. Gen. 265, he states, p. 268:

> "* * * the regular hours of work of per annum employees within the terms of Section 23 of the Act of March 28, 1934, are required to be fixed at not to exceed 40 per week, * * *".

In the same decision, p. 270, he states in passing on the right of such employees to overtime compensation:

> "Question 6 is answered in the negative. The term 'overtime' has never been applicable to employees paid on an annual basis and there is no purpose or intent shown by Section 23 of the Act of March 28, 1934, to extend the right to overtime compensation to employees paid on an annual basis who may be required to work more than their regular tour of duty of 40 hours per week."

It is difficult to understand how Section 23 could be applicable to monthly and per annum employees so as to require them to be placed on a forty hour week, but inapplicable insofar as their right to overtime compensation for work performed in excess of 40 hours per week. The Section, it would seem, either was applicable to such employees, or it was not. If applicable at all then all of it, and not merely a part of it was applicable.

d. Congress' knowledge of the alleged administrative practice.

The allegedly well-known administrative practice here involved consists of a decision announced by the Comptroller General on April 12, 1934, and subsequently reaffirmed on August 25, 1934. The decisions in question are published in 14 Comp. Gen. 156. There is not one word in the record to show that the Congress knew of these decisions, or knew how Section 23 had been applied to employees of the Panama Canal.

Petitioner refers to the fact that in 1937 the Congress enacted the Act of June 9, 1937, c. 470, 50 Stat. 486, reaffirming the President's authority to fix salary, hours of labor and other conditions of employment of employees of the Panama Canal, and that while the legislation was pending, the Canal authorities objected to the inclusion of Section 23 of the Act of March 28, 1934, in the proposed Bill. In this connection they wrote to the Senate Committee considering the legislation, and noted that Section 23 affected a "special group of employees", only "some 900 out of about

3,000 American employees of Canal". The letters in question are printed as Appendix C to the petition for Certiorari, pp. 32-37.

It is from these letters that the Congress is presumed by petitioner to have knowledge of the manner in which Section 23 had been administratively applied on the Canal Zone, and its subsequent enactment of the Act of June 9, 1937, *supra*, containing Section 23 of the Act of March 28, 1934, petitioner contends, operates as a legislative ratification of that administrative application.

These letters actually inform the Congress of nothing whatsoever. The Canal authorities pointedly fail to state the classes of employees affected by Section 23, and so far as Congress knew all 900 of the employees affected could have been monthly or annual employees. It is likewise significant that the Canal authorities fail to mention the fact that it had continued to work its monthly employees on a 48 hour week, although the Comptroller General had specifically stated that such employees were to be placed on a 40 hour week. Re-enactment of Section 23 as a part of the Act of July 9, 1937, *supra*, manifestly can operate as Congressional approval of the administrative practice only if such administrative practice was known to the Congress. *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 468. Here there is no affirmative showing that the Congress knew of the administrative practice, and circumstances indicate that it was actually misled with respect to such administrative practice.

It is doubtful whether the single decision of the Comptroller General, subsequently reaffirmed, can be said to establish a consistent, long continued administrative interpretation, in any event. This Court has indicated that it will not. *White* v. *Winchester Club*, 315 U. S. 32, 40. It has likewise held that a single decision by the Circuit Court of Appeals, followed by the codification of the laws does not engraft that interpretation of the law into the Code. *United States* v. *Raynor*, 302 U. S. 540, 551. And finally when the

law is clear and unambiguous the subsequent re-enactment of a statute does not constitute adoption of its administrative construction. *Iselin* v. *United States*, 270 U. S. 245, 251; *Wright* v. *United States*, 302 U. S. 573, 582.

Petitioner also calls attention to the fact that the Congress, during the present War Emergency, has enacted a number of Acts extending the payment of overtime compensation to Government employees. Petitioner contends that these Acts, and their legislative histories, indicate that the Congress in such Acts provided relief for monthly and per annum employees on the assumption that they did not receive overtime compensation under Section 23 of the Act of March 28, 1934.

The Acts in question are set forth in Appendix D to the petition for *Certiorari*, pp. 38-45. They need not here be discussed in detail. An examination of them will show that they contain overlapping provisions; many groups or classes of employees are entitled to overtime compensation under more than one of the Acts in question. Overtime compensation is provided in others for groups or classes already entitled to overtime compensation. For instance the Act of October 21, 1940, 54 Stat. 1205, provides overtime compensation to per diem and hourly employees, whose wages or compensation is fixed by wage boards or other wage fixing authorities, despite the fact that such employees admittedly are entitled to such overtime compensation under Section 23 of the Act of March 28, 1934. About all that the enactment of such legislation indicates is that, Congress, confronted with a grave emergency, intended to extend the payment of overtime compensation to all kinds and all classes of Government employees. The legislation was obviously enacted hurriedly, and in the face of a grave emergency. If indicative of anything it is only that the Congress was not too well aware as to what was the situation with respect to the payment of overtime compensation. The need for haste was apparent as it was essential that the services of Government employees be retained,

and without such legislation many would have left the Government to work in private industry under more favorable conditions of employment.

2. Method employed in computing respondent's overtime compensation.

To determine the amount of overtime compensation due the respondent the Court below multiplied his monthly compensation by 12 and divided the product by 52 to determine his compensation for a 40 hour week. His weekly compensation was then divided by 5 to ascertain his daily pay for an 8 hour day. One and one-half times this daily rate then represented one day's overtime compensation.

This method, petitioner contends, is erroneous. Its principal argument is based upon the fact that the Act of October 21, 1940, *supra*, which admittedly is broad enough to cover the respondent's employment, as well as that of numerous other classes of employees, provided for the payment of overtime compensation, which in the case of monthly employees was to be computed on a different basis from that employed by the Court below.

The Court below properly rejected this argument on the ground that a statutory method of computing overtime enacted in 1940 should not control compensation under a 1934 statute. As respondent's claim covers a period from 1934 to 1939 it is difficult to understand how the Court below could have ruled otherwise. Respondent's right to overtime compensation first accrued in 1934. Had his right then been recognized he would have received either the benefit of a 40 hour work week, or overtime compensation during the period from 1934 to 1939, and the 1940 Act, not having been enacted, manifestly could not control the computation of such overtime compensation.

The petitioner further contends that the method employed by the Court below does not follow settled administrative practice, nor does it give effect to the Act of June 30, 1906, *supra*.

The short answer to this contention is that petitioner has consistently, and even now urges that the settled administrative practice has been to deny overtime compensation to employees paid on a monthly basis. If the settled administrative practice has been to deny overtime compensation to such employees it is not understood just how there can be any settled practice with respect to the computation of overtime compensation for such employees. So far as the application of the Act of June 30, 1906, *supra*, is concerned it only provides a method for computing pay for fractional parts of a month for employees paid on a monthly or an annual basis. It makes no provision for the payment of overtime compensation to such employees, and it nowhere is suggested that it was intended to provide a method of computing overtime compensation.

This Court may also take judicial notice of the fact that, at the time the Act of June 30, 1906, *supra*, was enacted the work week for Government employees was 48 hours or more. Section 26 of the Act of March 28, 1934, shortened the work week for those employees whose compensation is fixed by wage boards or other wage fixing authorities to 40 hours. To that extent it certainly superseded the Act of June 30, 1906, and rendered it obsolete. It may here be suggested that the Comptroller General has held that, for the purpose of computing overtime compensation under the Act of June 28, 1940, c. 440, 54 Stat. 676, 678, a per annum employee receives his salary on the basis of a 5 day, 40 hour work week, and that such an employee is entitled to overtime compensation for work on Saturdays. 20 Comp. Gen. 39, 41. This ruling tacitly concedes that the Act of June 30, 1906, *supra* is no longer applicable once the Government has established a regular 40 hour work week.

The method employed by the Court below in computing the amount of respondent's overtime compensation is similar to the method employed in computing overtime compensation for monthly employees under the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat.

1960). *Missel* v. *Overnight Motor Transportation Company* (C. C. A. 4th Cir.), 126 Fed. 2d 98, 109. See also 20 Comp. Gen. 39.

3. The importance of the question here presented.

Petitioner contends that the decision of the Court below, if allowed to stand will impose a considerable financial and litigation burden upon the Government. It refers to the fact that almost an hundred similar cases have already been filed with the Court below, seeking a recovery totaling approximately one million dollars. It speaks of more than a thousand additional claims which may be filed by Panama Canal employees, and intimates that the implications of the decision will extend to employees of the War and Navy Departments, the Bureau of Engraving and Printing and the Government Printing Office.

It, of course, is a matter of record that approximately 80 similar claims have been filed in the Court below. The total amount claimed in such cases probably amounts to close to one million dollars. However, the amount claimed in such cases is always generously estimated, and the actual amount recoverable in those cases is probably not more than three or four hundred thousand dollars.

Respondent's counsel can assert with considerable assurance that there are not one thousand or more potential claims to be filed by employees of the Panama Canal. Virtually the entire class of Canal employees who are affected by the decision of the Court below have already filed their claims, and it is believed that at most there are not more than fifty additional potential claims upon which there can be any recovery. The Court is well aware of the fact that, unless such claims have already been filed in Court, claim for compensation accruing prior to 1938 is already barred by the Statute of Limitations.

There has been no showing made that any appreciable number of monthly employees of the War and Navy Departments, the Bureau of Engraving and Printing and the

Government Printing Office have regularly been employed on a work week exceeding forty hours. Unless they have been so employed claims of such employees are not apt to be prosecuted in the Court of Claims. Further the War Department admits that Section 23 does not apply to its employees. See Appendix B to petition for Certiorari, pp. 29-31.

The decision of the Court below will obviously affect the disposition of cases already filed. There is no real likelihood of any substantial number of additional claims being filed. While the claims already filed do amount to a substantial sum of money, the decision below is so manifestly sound and correct that it does not require review by this Court. Certainly the mere fact that a substantial sum of money is involved does not make this question one of such public importance as will justify review by this Court.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for Certiorari should be denied.

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July, 1944.